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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SEVERO ROMERO GOMEZ, Defendant and Appellant.	F058854 (Super. Ct. No. VCF188698) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Stephen Gilbert, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

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Severo Romero Gomez poured a flammable liquid on his girlfriend and set her and their bedroom on fire. While the victim was burning, her three daughters, two of them minors, rushed to her aid. She suffered severe burns. Gomez was convicted of attempted

murder, mayhem, arson, and felony child abuse. He now argues that there was insufficient evidence to prove felony child abuse, that the court gave the jury erroneous instructions, and that the sentence for arson should have been stayed pursuant to Penal Code section 654.[1] We reject these arguments and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

Gomez and Rosalva Rico lived in a house in Farmersville with Rosalva's twin 14-year-old daughters, R. and C. At about 9:30 p.m. on August 5, 2007, Gomez told Rosalva to go into the bedroom with him so he could identify clothes he considered too revealing for her to wear. After Rosalva tried on a few blouses, Gomez yelled, "You son of a bitch, you're not going to do it!" A glass containing a yellow liquid was in the room; Gomez grabbed it and threw the liquid in Rosalva's face. While she was trying to rub it out of her eyes, she realized she was on fire. Then she saw Gomez moving around the room with the glass. The room also began to burn, filling with smoke. Rosalva felt her face and head burning. She testified:

> "I no longer had hair. My ears were burning. My nose, my nose and my—fell, my mouth, my lips. I—I could feel like the pieces peeling off my face, skin."

Gomez locked the door of the burning room and fled the house.

The door locked from the inside, so Rosalva was able to open it and escape from the room. She went to the living room where she found R., one of the twins, and screamed to her for help. R. called out to C., the other twin, and Y., their older sister, who were in the front yard. C. and Y. came inside. All three saw their mother on fire. R. and Y. put the fire out with a pillow.

Rosalva was hospitalized for about 100 days. She sustained burns over 30 percent of her body, including areas of her face, neck, shoulders, upper extremities, torso, and scattered areas of her lower extremities. Most of the burns were very deep, extending

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[1]Subsequent statutory references are to the Penal Code.

into or all the way through the skin. She underwent a series of operations over three months to excise burn wounds and graft skin to close the wounds. For the grafts, skin had to be removed and transplanted from areas that were not burned, mainly her legs and back. During treatment, she developed severe respiratory failure because of smoke inhalation and the overwhelming extent of the burn injuries; she received a tracheostomy and had to use a ventilator. After the initial hospitalization, she underwent additional reconstructive surgery. She was still being treated by the burn center at the time of trial two years later and could need additional reconstructive surgery in the future.

The bed was destroyed by the fire. Some objects on the floor were also burned and the rest of the room sustained smoke and heat damage.

Firefighters found a melted plastic container that had a strong chemical odor and burned clothes with a similar odor. The container and clothes were tested and found to have traces of toluene. A quart-size can of a chemical called concrete lacquer was found in a shed in the yard. This chemical also contained toluene. Further, the chemical on the container and clothing was found to have a "peak pattern"—a type of chemical signature—which matched the peak pattern of the concrete lacquer.

It was not the first time Gomez abused Rosalva. Two weeks earlier, Gomez and Rosalva had an argument while driving in a car. Gomez drove into an orange grove and took a pistol from this sock. He clubbed her with the pistol, causing her head to bleed. She asked him to find a store with a bathroom, but he refused, saying she would call the police if he did. He also told her she would regret it for the rest of her life if she told her daughters. Rosalva agreed not to report the assault to anyone.

Gomez had also abused another woman, J.G. J.G. was Gomez's wife, and was still married to him at the time of the crimes and the time of trial. Gomez assaulted her more than 30 times. He kicked her, punched her, hit her with a chain and a bat, and shaved her hair off.

The district attorney filed an information charging Gomez with four offenses: (1) attempted premeditated murder (§§ 664, 187, subd. (a)); (2) aggravated mayhem (§ 205); (3) felony child abuse (§ 273a, subd. (a)); and (4) arson of an inhabited structure (§ 451, subd. (b)). In connection with count one, for sentence-enhancement purposes, the information alleged that Gomez inflicted great bodily injury under circumstances involving domestic violence. (§ 12022.7, subd. (e).) By the time the jury was instructed, the enhancement allegation had been changed to inflicting great bodily injury, without the domestic-violence circumstances. (§ 12022.7, subd. (a).)

The jury found Gomez guilty of each charged offense and found the enhancement allegation true. The court imposed a sentence of life with the possibility of parole for attempted murder, plus three years consecutive for inflicting great bodily injury. For arson, the court imposed a consecutive term of eight years. It imposed a consecutive term of 16 months for felony child abuse. For aggravated mayhem, the court imposed a sentence of life with the possibility of parole and stayed the sentence pursuant to section 654. The aggregate sentence was 12 years four months to life.

DISCUSSION

I. Sufficient evidence of child abuse

Gomez argues that the evidence was not sufficient to support the conviction for violating section 273a, subdivision (a). The statute requires proof that he acted under "circumstances or conditions likely to produce great bodily harm or death" of the children (§ 273a, subd. (a)), and Gomez says there were no such circumstances because R. was in another room and C. was in the yard. As we will explain, this argument has no merit.

When the sufficiency of the evidence is challenged on appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible,

and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

The statute provides:

> "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering … shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years." (§ 273a, subd. (a).)

The parties do not disagree about the facts. R. was in the living room and C. was in the front yard when Gomez set Rosalva and the bedroom on fire. Both girls ran to assist their mother. The prosecution's theory, explained in closing argument, was that Gomez inflicted unjustifiable mental suffering on the girls by causing them to see their mother on fire. The prosecution's task, therefore, was to prove that, by starting the fire, Gomez both (a) created circumstances likely to cause the children great bodily injury or death, since they also could have been burned in the fire; and (b) inflicted the mental suffering that arose from seeing their mother on fire. As the jury instructions explained, the prosecution also had to prove that Gomez was criminally negligent when he caused the danger or the harm.

Gomez first claims that "[t]he evidence failed to show that [he] did anything which was likely to cause the girls to suffer great bodily harm or death." Gomez is mistaken. This element of the offense is proven if the probability of serious injury is "'great.'" (*People v. Sargent* (1999) 19 Cal.4th 1206, 1216.) The evidence showed that Gomez set fire to a house while R. was in it and C. was right outside. This alone proves that he created circumstances in which the probability of great bodily injury to the children was great. The evidence also showed that Gomez set fire to the girls' mother while they were nearby. Their natural reaction was to come near the flames to help her. This also proves that Gomez created circumstances likely to cause great bodily injury or death. A reasonable jury could easily find Gomez guilty beyond a reasonable doubt.

Gomez next claims that, even if he caused a likelihood of great bodily injury or death to R., he did not cause a likelihood of this to C. because C. was outside. This argument is no better than the first. A reasonable jury could find that setting fire to a house creates a great probability of serious bodily injury to a person in the yard. It could also find that setting fire to a mother creates a great probability of serious bodily injury to her daughter if the daughter is nearby, since the daughter will naturally rush to the mother's aid.

Finally, Gomez asserts that the danger to the girls from the fire is "no more than speculation." We agree with the People's view that this is not speculation. It is obvious that setting fire to a house and a person inside the house poses a great risk of bodily injury to relatives in the house and its immediate environs.

II. Jury instructions on child abuse

The jury received these instructions for the section 273a, subdivision (a), offense:

> "Now, in Count 3, Mr. Gomez is charged with the crime of child abuse likely to produce great bodily injury or death in violation of Penal Code Section 273a(a).
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> "To prove Mr. Gomez is guilty of this crime, the People must prove three things:
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> "One, the defendant willfully caused or permitted a child to suffer unjustifiable mental suffering; two, the defendant inflicted suffering on the child or caused or permitted the child to suffer or be endangered under circumstances or conditions likely to produce great bodily injury—great bodily harm or death; and, three, the defendant was criminally negligent when he caused or permitted the child to suffer or be in danger."

These instructions were followed by definitions of "child," "[g]reat bodily injury," "[u]njustifiable mental suffering," and "[c]riminal negligence." The court also stated that the child need not actually suffer great bodily harm.

Gomez argues that these instructions were inadequate for two reasons. First, they did not specify that the danger of great bodily injury must be a danger to the child. This allowed the jury to find Gomez guilty of the offense even if it believed he created a

danger of great bodily injury only to Rosalva. Second, the instructions did not tell the jury it must find circumstances making great bodily injury likely for *both* children, even though the information named both children as victims; and even if a finding of a likelihood of great bodily injury were necessary for only one child, the instructions did not tell the jury it must unanimously decide which one.

On the first claim, we conclude there was no error. The instruction, which was in accordance with CALCRIM No. 821, made it sufficiently clear that the person exposed to a likelihood of great bodily injury must be the child on whom the defendant inflicts suffering, not some other person in the vicinity. If Gomez believed the jury might fail to grasp this because of the particular circumstances of the case and wanted the court to give a clarifying instruction or an instruction relating the evidence to a specific element of the crime, he could have requested that kind of instruction. He did not, so any claim of error based on the failure to give it has been waived. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204; *People v. Saille* (1991) 54 Cal.3d 1103, 1120.)

On both claims, any error was harmless under any standard. Gomez's theory of the prejudice arising from the challenged jury instructions is that there was not much evidence of a risk of great bodily injury to the girls, so the alleged deficiencies in the instructions probably influenced the outcome. In reality, however, the evidence that Gomez created a great probability of great bodily injury to both children was overwhelming. We are convinced, beyond a reasonable doubt, that the jury would have made that finding if the instructions had specifically said the finding was required for conviction. Gomez says the child abuse charge was "tenuous" and the evidence of it "slight," but these words simply mischaracterize the record. No reasonable jury could have failed to find a likelihood of great bodily injury to R. and C.

In his reply brief, Gomez says that if the finding of a likelihood of great bodily injury rests on the probability of the children rushing to aid their mother, the finding is erroneous because the children's act would be "an independent intervening cause" that

"supersedes the defendant's act" and "precludes a finding that his act was the proximate cause of a subsequent injury." There are at least two defects in this argument. First, the notion that the girls' entirely foreseeable response to Gomez's horrific act relieves him of criminal responsibility for the danger to them defies common sense. Second, the issue of proximate cause is irrelevant to the point at issue. The only findings section 273a, subdivision (a), required were that Gomez, through his criminal negligence, inflicted unjustified mental suffering on a child and did so under circumstances likely to produce great bodily injury. There is no requirement that great bodily injury actually occur, let alone any requirement that when it occurs the defendant is its proximate cause. Perhaps Gomez's point is that great bodily injury cannot be *likely* within the meaning of the statute unless the defendant would be the proximate cause of it if it happened. He cites no authority for that proposition, however, and we see no logical support for it.

III. Arson sentence

Gomez argues that the sentence for arson should be stayed under section 654 because the trial judge thought the arson conviction was based on the same act as the attempted murder, i.e., setting Rosalva on fire. At the sentencing hearing, the court stated:

> "Usually when we think of a crime of arson, we—we think of a structure being put on fire and some—sometimes people, of course, die as a result of that conduct. This was not that type of conduct. The arson was to the body of a living, breathing, innocent human being."

Section 654 provides, in part, as follows:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

This statute bars multiple punishments not only for a single criminal act, but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective. (*People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672,

675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*).) We review under the substantial-evidence standard the court's factual finding, implicit or explicit, of whether or not there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.) As always, we review the trial court's conclusions of law de novo. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.)

The trial judge was mistaken in his belief that the arson conviction was based on the act of setting Rosalva on fire. To the contrary, it was based on the act of setting the house on fire. Count four of the information alleged:

> "On or about August 5, 2007, in the County of Tulare, the crime of ARSON OF AN INHABITED STRUCTURE OR PROPERTY, in violation of PENAL CODE SECTION 451(B), a FELONY, was committed by SEVERO ROMERO GOMEZ, who did willfully, unlawfully, and maliciously set fire to and burn and cause to be burned an inhabited structure and inhabited property located at 638 N. DWIGHT ST., FARMERSVILLE, CA."

Similarly, the jury instructions stated that Gomez was charged with "arson of an inhabited structure" and that the People must prove he "set fire to or burned a structure …."

These facts make it clear that the guilty verdict meant Gomez committed arson by setting the house on fire, not by setting Rosalva on fire. The trial court's mistaken impression to the contrary does not require us to stay the sentence, for, regardless of that mistaken impression, the court imposed separate punishments and substantial evidence supported its decision to do so. Rosalva testified that Gomez first put the flammable liquid on her and lit it. She testified that he then proceeded to move around the room with the container of liquid and the room subsequently began to burn. This testimony was substantial evidence that Gomez committed separate acts by which he set Rosalva and the house on fire. Further, since Gomez set the house on fire *after* he set Rosalva on

fire, it could reasonably be inferred that he had two separate criminal objectives: killing Rosalva and destroying the house.

Gomez argues, in effect, that we are bound by the trial judge's mistake about the meaning of the verdict and that we are required by that mistake to overturn the judge's sentencing decision even though the decision was supported by substantial evidence. In other words, we should defer to the court's statement, which was not supported by the record, in order to reverse its act, which was supported by the record. This is illogical and conflicts with the principle that we review judgments, not the reasons given for them. (See, e.g., *Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1628.)

The evidence of dual objectives distinguishes this case from *Neal, supra*, 55 Cal.2d 11 and *People v. Clark* (1990) 50 Cal.3d 583 (*Clark*), on which Gomez relies. In *Neal*, the Supreme Court held that multiple punishments for attempted murder and arson violated section 654 because the evidence showed that "the arson was merely incidental to the primary objective of killing" the victims. (*Neal, supra*, at p. 20.) In *Clark*, the defendant claimed his objective in setting fire to the house was only to drive the occupants out, but the jury did not believe this and found him guilty of attempted murder as well as arson. (*Clark, supra*, at p. 595.) The Supreme Court held that section 654 barred multiple punishments for the two offenses because the arson was simply the means of carrying out the attempted murder. (*Clark, supra,* at p. 637.) In both *Neal* and *Clark*, multiple punishments were improper because the evidence showed that the defendants set buildings on fire for the sole purpose of killing people inside. The record in this case is not similar. The evidence is sufficient to support the view that Gomez had separate objectives of killing Rosalva and burning the house.

DISPOSITION

The judgment is affirmed.

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Wiseman, J.

WE CONCUR:

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Ardaiz, P.J.

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Levy, J.